IN THE HIGH COURT OF DELHI AT NEW DELHI

+CS (OS) No. 802/2001

Date of Decision: 22-05-2006

#Mrs. Ingeborg Foit Sharma
!
.....Plaintiff
Through Mr. G.S. Sistani

Versus

$Triveni Engineering & Industries Ltd.
^
.....Defendant
Through Mr.Abhishek with Ms. Ragini

CORAM :-
***THE HON'BLE MR.JUSTICE A.K.SIKRI**

1. Whether Reporters of Local papers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

A.K. SIKRI, J.
:

Plaintiff is the owner of premises bearing No.1106, measuring 869 sq. ft. and car parking space on the upper basement situated in the multi-storeyed building known as Ansal Bhawan, 16, Kasturba Gandhi Marg, New Delhi, had let out the premises to the defendant at a monthly rent of Rs.2,373/- plus Rs.200/- per month for car parking with effect from April 1973 to M/s. Triveni Engineering Works Ltd. M/s. Triveni Engineering was amalgamated with M/s. Triveni Oil Field Services Ltd. and the name of the amalgamated company was changed to

Signature Not Verified
Digitally Signed By:AMULYA
Certify that the digital file and physical file have been compared and the digital data is as per the physical file and no page is missing.

Triveni Engineering and Industries Ltd., the defendant herein as per the scheme of amalgamation sanctioned by this Court on 15th March 1996. Present suit is filed for recovery of a sum of Rs.26,28,214/- as damages for illegal use and occupation of the suit premises (hereinafter referred to as the 'suit premises'). It is averred in the plaint that with effect from 1st April 1984 it was agreed to increase the rent @ Rs.5 per sq. ft. with parking space @ Rs.200/- and thus, the defendant became liable to pay monthly rent of Rs.4,345/- plus Rs.200/- per month for parking charges effective from 1st May 1984. Thereafter, vide legal notice dated 22nd July 1987 the plaintiff approached the defendant to increase rent according to then prevalent market rate which was Rs.25/- per sq. ft. However, defendant refused to oblige the plaintiff. Consequently, legal notice dated 23rd November 1992 was sent on behalf of the plaintiff terminating the tenancy of the defendant with effect from midnight of 31st December 1992 and 1st January 1993 and the defendant was called upon to hand over the vacant and peaceful possession of the premises to the plaintiff on 1st January 1993 and the defendant was called upon to hand over the vacant and peaceful possession of the premises to the plaintiff on 1st January 1993. As the defendant did not vacate the premises, the plaintiff filed Suit No.3/93 in the Court of Senior Sub Judge, Delhi, in which decree dated 28th January 2001 was passed in favour of the plaintiff and against the defendant. Present suit is filed, as pointed out above, for recovery of damages claimed @ Rs.65/- per sq. ft. per

month as the defendant remained in possession of the premises illegally. The claim is confined to three years, due to limitation, and is claimed from 1st April 1998 and in this manner, the amount ofRs.20,69,460/- is calculated from 1st April 1998 till the date of filing of the suit. Interest @ 18% per month amounting to Rs.55,87,454/- upto 31st March 2001 is also calculated. It is also stated that as on the date of filing of the suit, possession was still not handed over and, therefore, the plaintiff was taking appropriate legal proceedings to get the possession of the property. It is also mentioned that inadvertently and on account of oversight, the plaintiff had failed to seek a decree of damages in the earlier suit filed by her. However, the plaintiff had in the earlier suit expressly reserved her right to file appropriate proceedings for recovery of damages for wrongful use and occupation of the premises @ Rs. 22,725/- per month. It may be mentioned that possession of the premises was handed over by the defendant to the plaintiff on 15th March 2002. Since the plaintiff has claimed damages for future period as well till the possession is handed over, the period involved under consideration is 1st April 1998 to 15th March 2002. It is not in dispute that defendant has paid the plaintiff the amount at contractual rate for the period in question.

2. In the written statement filed by the defendant the defendant has, inter alia, stated that the suit is barred under the provision of Order 2 Rule 2 CPC inasmuch as the plaintiff failed and omitted to claim this relief in the earlier suit

and, therefore, cannot now file a suit seeking relief which she could claim in the earlier suit. The rate at which damages are claimed is also denied.

3. Following issues were framed on 9th July 2004:-

1. Whether the suit is barred under the provisions of Order 2 Rule 2 CPC? OPP
2. Whether the plaintiff is entitled to recover a sum of Rs.20,69660 as damages/mesne profits @ 65 per month or at what rate and for what period? OPP
3. Whether the plaintiff is entitled to interest @ 18% p.a. on the said amount on the increasing balance every month rent or at what rate and for what period? OPP
4. Relief.

4. Ms. Hetu Arora, Advocate, was appointed as the Local Commissioner to record evidence of the parties. Both the parties have led their evidence. The Local Commissioner accordingly filed the said evidence along with her report dated 17.8.2005. I have heard learned counsel for the parties and have perused the documents as well as evidence on record. I have also considered written submissions filed by both the parties. My issue-wise findings are as under:-

5. <u>ISSUE NO. 1</u>:

In the written statement filed by the defendant the objection taken is that the suit is barred under the provisions of Order 2 Rule 2 CPC. The plaintiff, in the earlier suit, had only asked for decree of possession of the said premises and no claim whatsoever was made from the defendant for recovery of damages for wrongful use and occupation of the premises. However, she had reserved her right to file appropriate proceedings for recovery of damages for wrongful use and occupation of the premises from the defendant. But she had not asked for leave/permission of this court in this behalf when such an express permission is required.

6. Order II Rule 2 of the CPC reads as under:

> **"2. Suit to include the whole claim -(1)** Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.
>
> **(2) Relinquishment of part of claim**-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) **Omission to sue for one of several reliefs.**- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted."

7. It is clear from the reading of the aforesaid provision that in a suit to be filed by the plaintiff, whole of the claim based on a particular cause of action is to be included though it is the discretion of the plaintiff to relinquish any portion of the claim in order to bring the suit within the jurisdiction of any court. However, if the plaintiff omits to sue in respect of any portion of his claim or relinquishes any portion of his claim, he is precluded from filing another case subsequently in respect of the said portion which he omitted or relinquished. Even if there are more than one reliefs to which a plaintiff may be entitled to in respect of same cause of action and he omits to sue for all such reliefs, he cannot file subsequent suit afterwards in respect of any relief which he had omitted in the previous suit. The intention behind this provision is thus abundantly clear. In respect of a particular cause of action whole of the claim and all the reliefs founded on the said cause of action are to be included in the suit and if not included, subsequent suit for claim/relief omitted is barred. Interpreting this provision in the case of Sidramappa Vs. Rajashetty and others reported as **AIR 1970 SC 1059**, the Supreme Court held:

> "Cause of action is a cause of action which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for a larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings-See Mohd.Hafiz Vs. Mohd.Zakaria, 49 Ind App 9= (AIR 1922 PC 23)."

8. Therefore, the question that arises is as to whether claim for damages is founded on same cause of action. If it be so, the suit would be barred under Order 2 Rule 2 CPC. However, on the other hand, the claim for damages provides distinct cause of action. The suit would be permissible.

9. Identical issue came up for hearing before this Court in the case of *Girdhari Lal Dhara v. Amin Chand & Ors.*, **2001 VI AD (Delhi) 761**. After discussing plethora of case law on the issue the Court opined that suit for possession of immovable property is based on a distinct cause of action than the suit claiming damages and is, therefore, not by order 2 Rule 2 CPC. The relevant discussion on this aspect is contained in the following para:-

> **"ISSUE NO. 4**
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> I propose to take up this issue for discussion first. In previously instituted Suit No. 386/74 the plaintiff had claimed licence fee @ Rs.1500/- per month for a period of 5 years and mesne profits @ Rs.2450/- per month with effect from 7th November 1972 till the date of filing of suit, totalling Rs.50,375/-. Relying on the decisions in ***Naba Kumar Hazra and another vs. Radhashyam Mahish and others,*** AIR 1931 Privy Council 229, ***Mohammad Khalil Khan and others vs. Mahbub Ali Mian and others***, AIR (36) 1949 Privy Council 78; ***Mewa Kaur vs. Banarsi Prasad***, (1895) ILR 17 Allahabad 533; ***Ganeshi Lal vs. Bansi Dhar***, AIR 1933 Allahabad 84; ***Saghir Hassan vs. Tayab Hasan***, AIR 1940 Allahabad 524; ***Hiromal and others vs. Faridkhan***, AIR 1915 Sind 35 and ***Mohd. Yunas Fazal Mohamad vs. Mst. Jahan Sultan d/o Ahmad Din and another***, AIR (29) 1942 Peshawar 9, the submission advanced on behalf of contesting defendants was that as the relief of possession which was open to the plaintiff

in said Suit No. 386/74, was not claimed therein, present suit for possession of property is barred by Order II Rule 2 CPC. On the contrary, it was contended on behalf of plaintiff that previous suit claiming only the mesne profits would not bar subsequent suit for possession of property. In support of submission, reliance was placed on the decisions in ***Sadhu Singh and others vs. Pritam Singh S/o Narain Singh and another***, AIR 1976 Punjab & Haryana 38(FB); ***Shankarlal Laxminarayan Rathi and others vs. Gangabisen Maniklal Sikchi and another***, AIR 1972 Bombay 326 (FB); ***Abburi Rangamma vs. Chitrapu Venupurnachandra Rao and others***, AIR 1996 AP 325 (DB) and ***Prem Nath Kapur vs. Gurdit Singh & Ors.***, 1971 RLR (Note) 126. There has been conflict of judicial opinion on the question whether claim for possession of property and claim for mesne profits arising therefrom are two distinct and separate causes of action or both these claims constitute a single indivisible cause of action. Decisions other than in ***Naba Kumar Hajra and Mohd. Khalil Khan's*** cases (supra), relied on behalf of defendants, are by Allahabad, Sind and Peshawar High Courts. It may be noticed that ***Naba Kumar Hajra's*** case had been brought to the notice of court on behalf of appellants in Sadhu Sing's case (supra) and in Para No. 31 of the decision (on Page 46) it was observed that there was nothing to indicate that Privy Council intended to depart from the settled principle (both in Indian and English laws) that an action for mesne profits and an action for recovery of immoveable property were founded on distinct causes of action. Mohd. Khalil Khan's case was taken note of by this court in ***Prem Nath Kapoor's case*** (supra). In RFA No. 49/79 ***S. Santokh Singh & another vs. S. Gurbax Singh***, decided on 16th July 2001 a Division Bench of this court taking note of the ratio of aforesaid two Full Bench decisions rendered by Punjab & Haryana and Bombay High Courts, has affirmed the judgment rendered by single Judge of this court in Prem Nath Kapoor's case holding that suit for possession of immoveable property is based on a distinct cause of action and is thus not barred by Order II Rule 2 CPC. Following these two decisions the relief with respect to possession of suit land and construction raised

thereon must be held to be not barred by Order II Rule 2 (3) CPC. Issue is answered against the defendants."

10. Evidence in support of two claims is different. Therefore, cause of action would also be different in view of judgment in *Bhimangouda v. Sangappa Inappa Patil and others*, AIR 1960 Mysore 178. One may usefully quote the following passage from the judgment of *Shrikant Panachand Shah v. Walubai Panachand Shah*, AIR 1997 Bombay 216:-

> "11. It may be stated that the bundle of facts constituting cause of action for partition and separate possession by metes and bounds may not be identical for claim for mesne profits. Obviously the fact or the facts which the Plaintiff would be necessarily required to prove while claiming mesne profits would be different from the claim for partition. In a suit for mesne profits the evidence that may be required to be proved by the Plaintiff is the duration of wrongful possession of profits which the person in wrongful possession may have actualy received or in the alternative constructively which he might with ordinary diligence have received. The evidence in a suit for partition cannot be said to be identical to the evidence which may be required to be produced while proving mesne profits. In Sadhu Singh v. Pritam Singh, AIR 1976 Punj and Har 38 the majority view ruled that Order II, Rule 2 CPC does not bar a suit for mesne profits filed subsequently to a suit for possession of the property because the claim for those accrued mesne profits had not earlier been included therein. A fortiori, subsequent to the passing of the decree in a suit for partition, decree for mesne profits can be claimed in a separate suit. There is no bar either expressly or by necessary implication in filing subsequent suit for mesne profits when in the suit for partition such issue was neither raised nor considered. Order 20, Rule 12, CPC obviously which provides for decree for possession and mesne profits has no application to a suit for partition or separate possession

of share and cannot be said to create a bar in filing suit for recovery of mesne profits after the decree for partition was passed."

11. In any case, the plaintiff in the present case has claimed mesne profits/damages with effect from 1st April 1998. This period was not in question when suit for possession was filed by the plaintiff in the year 1993. This issue is accordingly decided in favour of the plaintiff and against the defendant.

12. ISSUE NO.2:

In order to prove the damages the plaintiff has proved two registered lease deeds as Ex. PW-1/6 and Ex. PW-1/7. The plaintiff who appeared as PW-1 has further deposed that she had enquired from her friends about the rent of premises in Tolstoy Marg area and was told that rate of rent from 1995 till the time defendant left the property, it was Rs.65/- per sq. ft., though he had admitted that the rent of properties varies from time to time. She has denied the suggestion that rent of the premises in similarly situated area during the period 1998 to 2002 was not more than Rs.13,000/- per month, inclusive of car parking space. She further stated that she had not made any enquiries about the rentals from real estate agents and property dealers. However, she stated that from the newspapers she found what should be the rent in the area.

13. The defendant on the other hand produced Mr. R.K. Kundra, Assistant Manager (S&P), ITI Limited as DW-1. He produced original lease

agreement dated 15th May 1997 as Ex. PW-1/1 and on that basis deposed that for the period 2000-2002 the rent was Rs.16,464/- per month in respect of premises No. 201-202, Second Floor, Rohit House, 3-Tolstoy Marg, New Delhi, which was taken by ITI Limited on rent. He also produced original record of payments of rent at the aforesaid rate to the landlords. In his cross-examination he stated that though the said agreement created lease for a period of three years, but it was not a registered document. He also stated that the present lease deed from 2003-205 is a registered document as per which the monthly rent payable is Rs.42,000/-.

14. Learned counsel for the plaintiff on the basis of Ex. PW-1/6 and Ex. PW-1/7 submitted that rental of the premises for the period in question @ Rs.65/- per sq. ft. was duly proved and the plaintiff was entitled to recover the damages at the said rate in addition to charging car parking space @ Rs.1,000/- per month. Learned counsel for the defendant, on the other hand, argued that the claim of the plaintiff for damages @ Rs.65/- per sq.ft. has no basis and has not been substantiated by conclusive material evidence. That was not the prevalent rate of rent during the relevant period. The prevalent rent during the relevant period for the suit property and the similarly situated premises was about Rs. 8-10 per sq.ft. per month. The suit property is one of the flats in a commercial building known as Ansal Bhavan. The defendant has placed on record the evidence of the rent for an identical flat in a next door building on the same road i.e. Rohit House, Tolstoy

Marg, New Delhi during the relevant period. Exhibit: DW-1/1 is the Lease Deed dated 15th April, 1997 with respect to two flats i.e. 201-202, each of 840 sq.ft. (converted into one hall) on the second floor of Rohit House situated at 3, Tolstoy Marg, New Delhi. The tenant under the said lease was a Government of India Undertaking, viz., M/s. ITI Limited having its registered office at 46/1, Magrath Road, Bangalore-25. The lease was for a period of 1.01.1997 to 31.12.1999. The said lease agrement Exhibit: DW-1/1 has been proved by the summoned witness DW-1 Shri R.K. Kundra, Assistant Manager (S&P) ITI Limited, 495-496, Main Madhuban Road, Shakarpur, Delhi. The said witness has also proved the actual payment of rent to the landlords under the said lease agreement at the rate mentioned in the said lease agreement. The proof of payment of rent for the month of April 1998 at the said rate is a copy of the bank register maintained by the said tenant and produced by the said witness as Exhibit:DW-1/2. The said witness further proved that the rent for the said flats for the period 2000-2002 was Rs.16,464/- per month. He produced the proof of the payment of rent during this period at Rs.16,464/- per month vide Mark 'A', Exhibits: DW-1/3 & DW-1/4. Thus independent of the lease deed Exhibit: DW-1/1 also the said witness from the Government Company has proved the prevalent market rent for the similarly situated premises at Rs.8-10 per sq. ft. per month. Thus it is clear that the rent was never Rs.65/- per sq. ft. during the relevant period as claimed by the plaintiff in the

suit.

15. Learned counsel for the defendant also submitted that the plaintiff has placed on record the lease deeds of a property which is not similarly situated or identical to that of the suit property. The said lease deeds (Exhibits: PW-1/6 & PW-1/7) cannot be looked into and considered. The actual payment of rent is also not proved as the plaintiff in her cross-examination has admitted that she had not made an enquiry about the rate of rent from the Real Estate Agents and property dealers. She also admitted that various other terms and conditions agreed between the parties are taken into consideration for determining the agreed rent for any property.

16. I have considered the respective submissions. The claim of the plaintiff for mesne profits is for the period from 1st April 1998 to 31st March 2001 and further damages till the premises are handed over, i.e. 15th March 2002. Premises are at 11th Floor, Ansal Bhawan, 16, Kasturba Gandhi Marg, New Delhi measuring 869 sq. ft. and car parking space of upper basement. Plaintiff has claimed mesne profits @ Rs.65/- per sq. ft. and has filed two lease deeds as Ex. PW-1/6 and PW-1/7. PW-1/6 is a lease deed in respect of 7th Floor of Tolstoy Marg, New Delhi. It is dated 24th May 1999 and the rent agreed therein is Rs.65/- per sq. ft. PW-1/7 is also of the adjacent premises in the same building on same terms between the same parties. Lease deed dated 15th April 1997 produced by the defendant as Ex. DW-1/1 is also in respect of a building at Tolstoy Marg, namely,

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Rohit House. The rent agreed therein is Rs.16,464/- for an area of 840 sq. ft. However, though this lease deed is for a period from 1st January 1997 to 31st December 1999, it was only a renewal agreement and the tenant was already in possession. In view thereof, complete reliance on this agreement cannot be laid. Further having regard to the fact that the lease deed produced by the parties are of Tolstoy Marg and the premises in question is at Kasturba Gandhi Marg, which is quite proximate and the two sets of lease deeds produced by the parties showing the rental of Rs.65/- per sq. ft. and Rs. 20/- per sq. ft. respectively, I am of the opinion that ends of justice would be met by awarding mesne profits @ Rs.40/- per sq. ft. The plaintiff shall also be entitled to proportionate costs and interest @ 8% per annum with effect from the date of decree. Decree be drawn accordingly.

May 22, 2006
hp.

(A.K. SIKRI)
JUDGE

FAO(OS) 964/06